

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PEGGY ALLENDER,

Plaintiff,

vs.

Case No. 03-1396-JTM

RAYTHEON AIRCRAFT COMPANY,

Defendant.

MEMORANDUM AND ORDER

The court has previously granted summary judgment in favor of defendant Raytheon Aircraft Company, while at the same time denying a motion for partial summary judgment filed on behalf of the plaintiff Peggy Allender. The matter is now before the court on the plaintiff's motion for post-judgment relief.

Although it is denominated as a motion under Rule 59, the court finds — under the controlling laws and applicable rules — that it can only consider Allender's motion as a motion for relief under Rule 60. The court's order granting summary judgment was filed October 15, 2004. On October 22, Allender filed a Motion to Alter and Amend, stating with respect to that relief: "Plaintiff moves for an Order pursuant to Rule 59(3) of the Federal Rules of Civil Procedure." This is the totality of the motion with respect to the requested alteration and amendment; plaintiff offers no justification or rationale for the relief sought. Such a motion is ineffective to set forth a basis for relief, since D.Kan.Rule 7.1(a) requires that motions of this

type must be “accompanied by a brief or memorandum unless otherwise provided by these rules.” None of the exceptions specified in Rule 7.1 applies here.

Nor may plaintiff rely on the motion for extension of time which accompanied her October 22 motion, or the fact that it was granted by the court on October 27 (Dkt. No. 99). The order granting such relief was improvident. The court lacks jurisdiction to extend the time for filing a motion under Rule 59(e). *Parker v. Board of Public Utilities of Kansas City, Kansas*, 77 F.3d 1289 (10th Cir. 1996). Plaintiff cannot do indirect circumvention — by filing an insufficient bare-bones motion and obtaining extended time for briefing — what she could not do directly: avoid the mandatory ten-day filing period for submitting motions for relief under Rule 59.

Because the matter is not to be considered as a timely Rule 59 motion, it is instead considered as a Rule 60(b) motion for relief from judgment. *Computerized Thermal Imaging v. Bloomberg, L.P.*, 312 F.3d 1292, 1296 n. 3 (10th Cir. 2002). Rule 60(b) permits a district court to vacate or modify its judgment on any of the following grounds:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Relief under Rule 60(b) “is extraordinary and may only be granted in exceptional circumstances.” *LaFleur v. Teen Help*, 342 F.3d 1145, 1153 (10th Cir.2003) (quotations omitted).

Allender's arguments fail to show a basis for relief under Rule 60. She complains the court did not receive oral argument on the summary judgment motions. But oral argument is only permitted, not required, under D.Kan. Rule 7.2. And the court finds no basis for concluding, in the face of the uncontroverted evidence cited in the order of October 15, 2004, that the results in this matter would have been altered in any way had oral argument been allowed. Allender also seeks to re-argue various points of fact. But the arguments are simply re-arguments or reiterations of previous arguments, based on existing evidence, it is not evidence which is newly discovered. The findings of uncontroverted facts set forth in the order of October 15, 2004, were those which were correct and appropriate in light of the evidence and pleadings submitted to the court. Plaintiff's attempt to re-argue certain elements of those facts fails to present a valid claim for relief under Rule 60.

IT IS ACCORDINGLY ORDERED this 7th day of February, 2005, that the plaintiff's Motion to Alter and Amend (Dkt. No. 97) is hereby denied.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE